

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
) 2:04-cr-0065 GEB
Plaintiff,)
)
v.) ORDER
)
BILLY D. SOUTHERLAND,)
)
Defendant.)
_____)

Pending is Defendant Billy D. Southerland's ("Southerland") motion for "an order staying the imprisonment portion of his sentence pending the Ninth Circuit's decision on his appeal from the district court's orders, judgment and sentence in this case." (Mot. at 1.) A tentative ruling on the motion was filed on September 8, 2005, followed by a hearing on September 9, 2005. The question, then and now, is whether there is "clear and convincing evidence that [Southerland] is not likely to flee or pose a danger to any other person or the community." 18 U.S.C. § 3143(b) (1) (A).

The government contends that Southerland poses an economic danger to the community and a risk of flight. Southerland contends that he is not a danger to the community and not likely to flee. Southerland further argues that an electronic or global positioning

1 system (GPS) device could be used as a condition of his release to
2 ensure he does not flee.

3 DISCUSSION

4 I. Economic Danger to the Community

5 The record reveals that Southerland could pose an economic
6 danger to the community if released. Southerland's apparent
7 obliviousness at his sentencing to the criminal activities underlying
8 the guilty verdict coupled with his complete lack of remorse and
9 proclamations of innocence indicate that he is not averse to engaging
10 in the type of criminal behavior again.¹ Notwithstanding his likely
11 recidivism, it is unlikely Southerland will pose an economic danger to
12 the community if released since it should be feasible to fashion
13 reasonable conditions that mitigate against the threat of economic
14 danger he poses.

15 II. Likely to Flee

16 A. Flight Risk

17 The factors enumerated in 18 U.S.C. § 3142(g) to be
18 considered when assessing the risk of flight include: (1) the nature
19 and circumstances of the charges and counts of conviction, (2) the
20 weight of the evidence against the defendant, and (3) defendant's
21 history and personal characteristics.

22 1. The Nature and Circumstances of Charges and Counts of
23 Conviction

24 Southerland was convicted of mail fraud. Southerland's
25 scheme to defraud involved thousands of victims who suffered a loss by
26 paying money to Southerland's vehicle moving business to get their

27 ¹ These findings are also pertinent to the discussion in
28 section II. A. 3. a. infra.

1 vehicles moved but did not get their vehicles moved. Southerland
2 obtained from victims a minimum of \$200 through a fraudulent
3 representation about his vehicle moving business's movement success
4 rate, which constituted an intended loss of \$439,400 (\$200 multiplied
5 by the number of victims between December 18, 2002, through
6 November 30, 2003). (Rule 35 Sentencing Order filed Aug. 15, 2005, at
7 7-8, n.5.) After Southerland obtained certain victims' money, his
8 behavior toward them was obnoxious, obscene and insulting. This
9 factor weighs against release.

10 2. The Weight of the Evidence

11 Substantial questions are involved with determination of the
12 amount of loss, which if resolved in Southerland's favor, would result
13 in a sentence less than the sixty-seven month prison sentence
14 Southerland received. This factor weighs in favor of release.

15 3. History and Personal Characteristics

16 a. Character

17 The jury verdict, which convicted Southerland of three
18 felony counts of fraud, and the trial record shed light on
19 Southerland's personal character. The trial testimony revealed that
20 Southerland was verbally abusive when communicating with some of his
21 customers during telephone conversations, and that this abuse at times
22 included name calling, use of expletives, and rudely hanging up on
23 some of his customers.

24 In addition, the Magistrate Judge's Order filed May 24,
25 2004, indicates Southerland possesses an abusive character.
26 Specifically, the Magistrate Judge inferred from "the filing of
27 letters of clarification by [Southerland's wife and daughter]
28 following the hearing" that "neither [the wife nor the daughter] was

1 willing or able to testify regarding . . . defendant's abusive
2 behavior." (May 24 Order at 11-12.) The Magistrate Judge observed
3 that "[t]his unwillingness or inability further suggests defendant
4 exerts some level of intimidation or control over his wife and
5 daughter, however subtle or subconscious." (May 24 Order at n.10.)

6 b. Past Conduct

7 The transcript of Southerland's detention hearing held
8 February 4, 2004, reveals that the Magistrate Judge essentially found
9 that Southerland was in the process of trying to flee when law
10 enforcement agents encountered him on his premises, which they were
11 about to search. The transcript reveals when Southerland was then
12 encountered, "the house was packed, the car was packed, and there was
13 a passport and \$12,000 cash in [a safe located in a] truck." (Tr. at
14 4, 23.) The Magistrate Judge also observed that "according to the
15 government, there's a minimum of a million dollars missing here. . ."
16 and that Southerland's action "seems like flight" (Id. at
17 12.)

18 Although it was argued at that detention hearing that
19 Southerland was on his way to Texas, the Magistrate Judge observed,
20 "you don't need a passport to go to Texas." (Id. at 23.) A law
21 enforcement agent told the prosecution at the hearing that at the end
22 of the day on which Southerland's premises was searched, Southerland
23 stated he intended to go to Scotland. (Id. at 24.) The agent related
24 that Southerland said "there's a passport and cash in a safe in the
25 back of the Suburban, I want it." (Id. at 25.) "I'm going to
26 Scotland." (Id.) Southerland's attorney argued Southerland did not
27 tell the agent he was going to Scotland, but Southerland's counsel
28 stated at the end of the hearing that Southerland has been to Scotland

1 before, "he's Scottish" and Southerland had "a reservation to go to
2 Scotland in June." (Id. at 31, 33.) Also, the "agents were told by
3 one of the gentlemen that ran [Southerland's] computer system, that
4 Mr. Southerland had said to this person . . . that [he] could run this
5 system from Belize or Scotland." (Id. at 30.) This computer system,
6 or internet business, was involved with the crimes of which
7 Southerland was convicted. (Id.)

8 At a subsequently held detention hearing on March 31, 2004,
9 Southerland submitted misleading information regarding the equity in
10 his residence in Anderson. Specifically, he submitted a letter from a
11 real estate agent, Ken Murray, as evidence of \$150,000 fair market
12 value of the property. When this letter was submitted to the Court,
13 his property was listed on the Multiple Listings Service through
14 another real estate agent.

15 The Magistrate Judge ordered Southerland released on bond at
16 a minimum of \$48,000 which would be secured by his Anderson property.
17 But Southerland failed to tell the Court that he had filed a homestead
18 exemption between the time of ordering a title report and offering the
19 documents to the Court. The effect of filing the homestead exemption
20 was that there was no available equity, because pursuant to California
21 Civil Procedure Code sections 704.720 and 704.730, upon the sale --
22 voluntary or by execution -- up to \$75,000 of the proceeds from the
23 sale of the property must be paid to the homesteader. Thus, the
24 equity Southerland offered for his appearance bond appeared to be
25 illusory.

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1 c. Family Ties

2 The record is devoid of evidence of family ties evincing
3 that Southerland has relationships with family members "wherein the
4 family members had some control, either physical or emotional, over
5 [Southerland's] action." United States v. Trosper, 809 F.2d 1107,
6 1110 (5th Cir. 1987). Although Southerland indicated through his
7 attorney at the April 8 hearing that he desires to see his grandchild
8 who was born while he has been incarcerated, this desire does not show
9 the existence of a family relationship likely to dissuade Southerland
10 from fleeing. Since Southerland was in the process of leaving
11 California at the time his premises were searched, he presumably did
12 not have sufficient family ties to dissuade him from leaving the area.
13 And he presumably does not have such ties now.

14 d. Financial Resources

15 Although Southerland argues he lacks the financial resources
16 necessary for flight, the record indicates that his criminal
17 activities involved a large sum of money. It is assumed that
18 Southerland could obtain the funds necessary for flight from some of
19 that money or from close acquaintances.

20 e. Criminal History

21 Southerland's Pretrial Services Report dated February 2,
22 2004 ("PSR"), revealed Southerland's criminal history. That history
23 includes a 1971 voluntary manslaughter conviction; and a conviction
24 for disturbing the peace for which he was sentenced to one year
25 probation in April 2002.

26 Further, in light of Southerland's proclamation of his
27 innocence at his sentencing hearing, it is assumed that he has a
28 motive to flee so he could avoid facing approximately thirty-five

1 months of additional prison time for business practices found by the
2 jury to be fraudulent but which he opines were legal. When all
3 aspects of Southerland's history and characteristics are considered,
4 this factor weighs against release.

5 Consideration of all three factors reveals that Southerland
6 is likely to flee if released.

7 B. Ability of Electronic or GPS Device to Ensure
8 Southerland Does Not Flee

9 Southerland argues that any threat of flight can be
10 eliminated by the use of an electronic or GPS device as a condition of
11 his release. This argument disregards the limitations of such
12 devices.

13 Conventional electronic monitoring . . . would
14 only apprise authorities of whether Mr.
15 [Southerland] was in or out of his home, and would
16 . . . give him ample lead time if he wished to
17 flee. See United States v. Townsend, 897 F.2d at
18 994-95 ("Nor does the wearing of an electronic
19 device offer assurance against flight occurring
20 before measures can be taken to prevent a detected
21 departure from the jurisdiction.").

22 United States v. Anderson, ___ F.3d ___, 2005 WL 1910496 at *9 (D.D.C.
23 Mar. 16, 2005). Further, even the GPS-based monitoring system could
24 be disabled "for a period of time sufficient to allow him to flee."

25 Id. The testimony of Pretrial Services Officer Phil Davis at the
26 September 9 hearing revealed an additional limitation. He stated that
27 electronic monitoring is available, but if Defendant elected to flee
28 on a Friday, this flight probably would not be discovered until two or
three days afterward. Mr. Davis indicated that the same detection of
flight problem exists with a GPS-based monitoring system.

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CONCLUSION

For the stated reasons, a condition or combination of conditions will not reasonably assure Southerland's appearance as required. Therefore, his motion is denied and he is detained as a flight risk.

IT IS SO ORDERED.

Dated: September 15, 2005

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge